

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
May 24, 2005

Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Rivercat Foods, Inc.
v.
Sacramento River Cats Baseball Club, LLC

Opposition No. 91150539
to application Serial No. 78975148
filed on March 29, 2001

Rivercat Foods, Inc., pro se.

Lori Krafte of Greenebaum, Doll & McDonald for Sacramento
River Cats Baseball Club, LLC.

Before Hairston, Chapman and Grendel, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant, Sacramento River Cats Baseball Club, LLC,
seeks registration on the Principal Register of the mark
RIVERCATS, as depicted below in special form,



for goods identified in the application as "clothing; namely, shirts, tee shirts, polo shirts, knit shirts, golf shirts, jackets, sweat shirts, sweaters, jerseys, v-neck pullovers, hats and visors" in Class 25.¹

Opposer, Rivercat Foods, Inc., has opposed registration of applicant's mark on the ground that applicant's mark, as applied to the goods identified in the application, so resembles opposer's mark RIVERCAT, which is registered (in standard character (typed) form) for goods identified in the registration as "seafood, namely, smoked albacore, smoked sturgeon, chinook salmon, shrimp, lobster, salmon, oysters, clams, caviar, calamari, catfish, escargot, fish fillets and sardines, and deli meats, namely, ham, turkey, bologna, salami, hot dogs, hamburger, sausages, corned beef, chicken, liver, bacon, and deli sliced cheese" in Class 29,² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

¹ Application Serial No. 78975148, filed on March 29, 2001. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and November 22, 1999 is alleged in the application as the date of first use of the mark anywhere and the date of first use of the mark in commerce. The application is a "child" application of application Serial No. 78055859, which as filed was for goods in Classes 6, 14, 16, 25 and 28. After opposer opposed registration as to Class 25 only, Serial No. 78055859 was divided, with the Class 25 goods moved to Serial No. 78975148 (the application involved herein) and the other four classes remaining in Serial No. 78055859. The "parent" four-class application subsequently matured into Registration No. 2829765, issued on April 6, 2004.

² Registration No. 2509335, issued November 20, 2001 from an application filed on July 11, 2000.

Applicant filed an answer by which it admitted opposer's allegation (in paragraph 1 of the notice of opposition) that, "[i]n addition fast foods such as hot dogs and other sandwiches are served at the Applicant's baseball stadium events," and also admitted opposer's allegation (in paragraph 3 of the notice of opposition) that, "[t]he dominant portion of both marks sounds the same when spoken." Applicant otherwise denied the salient allegations of the notice of opposition.

In addition, applicant filed a counterclaim for cancellation of opposer's pleaded registration. In its amended counterclaim,³ applicant asserts as its ground for cancellation what is essentially a hypothetical Section 2(d) claim, i.e., that if a likelihood of confusion exists (as opposer alleges), it is applicant, not opposer, which is the prior user of the mark, and that applicant therefore is entitled to cancellation of opposer's registration pursuant to Trademark Act Section 2(d). Opposer filed an answer to the amended counterclaim by which it denied the salient allegations thereof.

The evidence of record consists of the pleadings herein (including applicant's admissions of certain of the

³ In a July 10, 2003 order, the Board found, *inter alia*, that applicant's original counterclaim failed to state a ground for cancellation. The Board allowed applicant time to submit an amended counterclaim, and applicant timely filed its amended counterclaim on August 11, 2003.

allegations in the notice of opposition, as described above), the file of applicant's involved Class 25 application Serial No. 78975148, and the file of opposer's Registration No. 2509335, the registration involved in applicant's counterclaim. However, the allegations (including allegations of dates of first use), specimens and other documents and exhibits contained in the files of applicant's application and opposer's registration, respectively, are not substantive evidence in this case because they were not introduced or proved at trial. See Trademark Rule 2.122(b)(2), 37 C.F.R. §2.122(b)(2); TBMP §704.03(a) (2d ed. rev. 2004). Finally, the Board already has held (in its September 7, 2004 interlocutory order) that applicant, by virtue of its filing of its counterclaim and in view of certain of the averments contained therein, has admitted that opposer's pleaded registration is extant and owned by opposer. Opposer's pleaded registration therefore is of record, for purposes of both the opposition and the counterclaim. Neither party made any testimony or other evidence of record during their respective testimony periods.⁴

⁴ During its testimony period, opposer filed the testimony deposition of its principal Les Cochren, but that testimony was stricken, on applicant's motion, by order of the Board dated June 23, 2004. We have given the testimony no consideration.

Opposer and applicant filed main briefs as plaintiff and defendant, respectively, in the opposition proceeding, but opposer did not file a reply brief. Neither party has briefed applicant's counterclaim. No oral hearing was requested.

We turn first to applicant's counterclaim for cancellation of opposer's pleaded Registration No. 2509335. As noted above, the counterclaim essentially is a hypothetical Section 2(d) claim based on applicant's alleged priority of use, i.e., since November 22, 1999, the date of first use alleged in applicant's application. However, applicant failed to present any evidence at trial in support of this claimed prior use. Applicant's earliest priority date, therefore, is the filing date of its involved application, March 29, 2001. Opposer, as defendant in the counterclaim, likewise is entitled to rely for priority purposes on its own application filing date, July 11, 2000, a date prior to applicant's filing date. We therefore find that applicant has failed to establish its priority, and that its (hypothetical) Section 2(d) ground for cancellation of opposer's pleaded registration must fail.

For the reasons discussed above, applicant's counterclaim for cancellation of opposer's pleaded Registration No. 2509335 is denied.

We turn next to opposer's opposition to registration of applicant's mark. Because opposer's pleaded registration is extant, owned by opposer, and of record, we find that opposer has established its standing to oppose. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Furthermore, because opposer's pleaded registration is of record, priority of use under Section 2(d) is not an issue in this opposition proceeding. *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Thus, the only issue remaining for determination is the issue of likelihood of confusion. Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We commence our analysis with the first *du Pont* factor, i.e., whether applicant's mark and opposer's mark are similar or dissimilar when compared in their entireties in

terms of appearance, sound, connotation and commercial impression. In terms of appearance, we find that the marks are identical except for the background design element of applicant's mark and the fact that applicant's mark is the plural RIVERCATS and opposer's mark is the singular RIVERCAT. In terms of pronunciation, the marks are identical except for this plural/singular distinction. The connotation of "rivercat" is not apparent on this record, but because both parties are located in Sacramento, California, it might be assumed that the term has some local connotation or significance. In terms of overall commercial impression, we find that applicant's mark, as applied to applicant's clothing items, is likely to be perceived as the name of applicant's baseball team. The commercial impression of opposer's mark, as applied to opposer's food products, is not clear, but we cannot conclude on this record that it has anything to do with baseball, with applicant's baseball team, or with clothing items in general. Considering the marks in their entireties based on these findings, we conclude that the marks are more similar than dissimilar, and that the first *du Pont* factor therefore weighs in opposer's favor.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of applicant's goods and opposer's goods. The third *du Pont* factor requires us to

determine the similarity or dissimilarity of the trade channels for the respective goods. For the reasons discussed below, we find that although the trade channels and classes of purchasers for the respective goods are potentially overlapping, opposer has failed to establish that its goods and applicant's goods are sufficiently similar or related to support a finding of likelihood of confusion.

The goods are inherently dissimilar; applicant's goods are clothing items and opposer's goods are food products. The evidence of record does not support a finding that it is typical for clothing items and food products to originate from the same or a related source, nor is there any evidence from which we might conclude that the relevant purchasers are likely to assume that such a source connection exists.

The parties' goods, as broadly identified in the application and registration, respectively, are presumed to be marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. See *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Opposer argues, and applicant has admitted (in its answer to the notice of opposition), that "fast foods such as hot dogs and other sandwiches are served at the Applicant's baseball stadium events." We presume that applicant's clothing items

likewise are offered for sale at applicant's baseball stadium events, and that the trade channels and classes of purchasers for the respective goods therefore are potentially overlapping. However, even assuming that opposer's RIVERCAT food products might be offered for sale at applicant's RIVERCATS baseball stadium events, there is no evidentiary basis for finding that the relevant purchasers in this context, i.e., persons attending applicant's baseball stadium events, are likely to assume that a source, sponsorship or other connection exists between the clothing items applicant sells at its baseball stadium and opposer's food products. There is no evidence in the record from which we might infer or conclude that baseball teams typically use, or license or otherwise allow others to use, their team names as trademarks on food products, or that the relevant purchasers are aware of such practice if it exists. Nor is there any basis in the record for concluding that purchasers familiar with opposer's RIVERCAT food products would assume, upon encountering applicant's RIVERCATS clothing items, that a source, sponsorship or other connection exists.

Considering the evidence of record as to all of the pertinent *du Pont* factors, we find that although applicant's mark and opposer's mark are more similar than dissimilar, and although the parties' respective goods may be marketed

in overlapping trade channels and to overlapping classes of purchasers, the goods themselves are simply too dissimilar and unrelated to support a finding of likelihood of confusion. This dissimilarity of the goods, under the second *du Pont* factor, simply outweighs the evidence under the other *du Pont* factors, and it precludes a finding of likelihood of confusion. See *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 USPQ 151 (TTAB 1983), *aff'd* 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984).

Decision: Opposer's opposition to applicant's application Serial No. 78975148 is dismissed. Applicant's counterclaim for cancellation of opposer's Registration No. 2509335 is denied.